

In the United States 2  
**Circuit Court of Appeals**  
For the Ninth Circuit.

In the Matter of

MARGARET E. TOOHEY,  
a Bankrupt.

Mazie McLeod and Edwin J. Miller,  
*Appellants,*

*vs.*

Dan Boone, a petitioning Creditor, and  
Hubert F. Laugharn, trustee in  
Bankruptcy.

*Appellees.*

Upon Appeal from the District Court of the United States for the  
Southern District of California, Central Division.

REPLY BRIEF OF APPELLEES ON MOTION  
TO DISMISS APPEAL.

KENNETH E. GRANT and

GILBERT B. HUGHES,

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*Solicitors for Appellees.*

**FILED**



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*To the Honorable Circuit Justice and to the Circuit  
Judges of the United States Circuit Court of Appeals  
of the Ninth Circuit:*

Appellants' brief in reply to appellees' motion to dismiss the above appeal concerns itself much more with the merits of the appeal than it does with the pure question of law which is presented by the motion to dismiss.

Feeling as appellees do that the court at this stage of the proceeding is not interested in the merits of the cause appellees in this brief will not endeavor to answer any

portion of appellants' reply brief except that dealing with the merits of the motion to dismiss, and we are inclined to leave the matter for the decision of the court on the briefs already filed. Appellees feel that General Order in Bankruptcy XXI, section 3, presents a complete answer to the extended argument of appellants; and with brief reference to this General Order, and its application to this matter, appellees will rest.

**The Appeal Involves a "Proceeding" in Bankruptcy and Not a "Controversy", and Not Having Been Taken in the Manner and the Time Provided by Law Should Be Dismissed.**

Appellees will not burden the court with a repetition of the points and argument made by them in their opening brief.

The instrument by which appellants and others assigned to Dan Boone speaks for itself [Transcript of Record, pages 28 to 31, inclusive]. It definitely authorizes, appellees submit, a *pro tanto* subrogation of appellants' allowed claims in favor of Boone.

General Order in Bankruptcy XXI, section 3, provides in part as follows:

" . . . Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter."

The very existence of this General Order shows the routine nature of the proceeding from which appeal has been taken, and definitely establishes it as a "proceeding," rather than a "controversy." The cases cited by appellants are easily distinguished from the case at bar. Those cases clearly involved "controversies" between strangers to the bankruptcy proceedings, and in most of the cases cited no *res* was in the possession of the trustee for distribution.

In the instant case the order appealed from was made strictly with relation to distribution of the bankrupt's estate; the claims of appellants were subrogated *pro tanto* to the assignment in favor of Boone strictly in accordance with General Order XXI, section 3, and the trustee was directed to make payment of the funds in his possession accordingly. Plainly this involves nothing unusual in the routine administration of a bankrupt estate.

### Conclusion.

Appellees respectfully submit that since only a routine "proceeding" in bankruptcy is involved in this appeal and since the appeal, as pointed out in the opening brief, has been taken with entire disregard of the time and manner provided for appeals involving "proceedings" in bankruptcy, the court is without jurisdiction to consider the appeal and an order of dismissal is proper.

Respectfully submitted,

KENNETH E. GRANT and

GILBERT B. HUGHES,

By GILBERT B. HUGHES,

*Solicitors for Appellees.*

